

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

MOISES VALLE MERCADO,
Defendant.

No. CR-07-2018-FVS-1

ORDER DENYING MOTION TO
VACATE

THIS MATTER comes before the Court based upon the defendant's motion to vacate his conviction and sentence. He is representing himself. The government is represented by Jane Kirk.

BACKGROUND

A jury convicted Moises Valle Mercado (hereinafter "the defendant") of the crimes of conspiracy to distribute a controlled substance, 21 U.S.C. § 846, and possession of a controlled substance with intent to distribute, 21 U.S.C. § 841(a). A new attorney was appointed to represent him at sentencing. The Court sentenced him to a term of 200 months imprisonment. He appealed his conviction and sentence. A new attorney was appointed to prosecute the appeal. The Ninth Circuit affirmed the judgment. The defendant petitioned the Supreme Court for a writ of certiorari. His petition was one day late. The Supreme Court denied the petition on November 2, 2009. On

1 July 26, 2010, he filed a motion to vacate his conviction and
2 sentence. 28 U.S.C. § 2255. He lists five grounds for relief.
3 First, he alleges the attorney who represented him at trial deprived
4 him of effective assistance of counsel by failing to object to certain
5 testimony that was given by a law enforcement officer. Second, he
6 alleges the attorney who represented him at sentencing deprived him of
7 effective assistance of counsel by failing to cite persuasive
8 authority in support of his contention that he was a minor participant
9 in the offense. Third, he alleges the attorney who represented him at
10 trial deprived him of effective assistance by failing to move to
11 dismiss the indictment. Fourth, he alleges he was deprived of
12 effective assistance of counsel as a result of the cumulative impact
13 of the errors committed by the attorneys who represented him during
14 and after his trial. Fifth, he alleges his conviction and sentence
15 violate the First, Fourth, Fifth, Sixth, and Eighth Amendments to the
16 Constitution.
17

18 **SUMMARY OF EVIDENCE PRESENTED AT TRIAL**

19 Both the government and the defendant offered evidence at trial.
20 Based upon the evidence that was admitted, the jury easily could have
21 found the following facts beyond a reasonable doubt: Law enforcement
22 officers apprehended a drug dealer. They offered him an opportunity
23 to mitigate his punishment by helping them catch other drug dealers.
24 He agreed to become an informant, and he began looking for persons
25 from whom he could purchase drugs. During January of 2007, he met the
26

1 defendant at a casino. In due course, the defendant agreed to
2 introduce the informant to a person whom the defendant knew, at least
3 by reputation, was a drug dealer. The defendant and the informant
4 arranged to meet on January 18th. Law enforcement officers attached
5 an electronic device to the informant so they could listen to his
6 conversation with the defendant. The two men met at a restaurant.
7 They conversed in Spanish. A Spanish-speaking detective
8 electronically monitored the conversation. The defendant told the
9 informant the seller of drugs was across the street at an auto body
10 shop. The defendant and the informant walked to the shop together.
11 The defendant introduced the informant to Ernesto Perales. Mr.
12 Perales showed the informant two pounds of methamphetamine. The
13 defendant left the shop and purchased some bleach at a nearby
14 convenience store so the informant could test the methamphetamine.
15 The informant indicated he was satisfied with the quality of the
16 methamphetamine Mr. Perales was offering to sell. The informant
17 agreed to purchase eight pounds for eighty-eight thousand dollars.
18 The defendant was present when the informant inspected the
19 methamphetamine and when he agreed to purchase eight pounds. Mr.
20 Perales only had two pounds in his shop at the time. He said he
21 needed 30 minutes to obtain the other six pounds. The informant left
22 the shop and spoke to law enforcement officers. They observed a
23 vehicle arrive at the shop. The driver carried a duffel bag into the
24 shop. The informant returned to the shop. He told Mr. Perales
25
26

1 someone would be by shortly with the agreed-upon sum of money. The
2 informant left the shop. Law enforcement officers entered the shop
3 without a search warrant and secured the premises until a judge issued
4 a warrant. The defendant was present with Mr. Perales and the courier
5 when law enforcement officers entered the shop and seized the
6 methamphetamine the informant was supposed to purchase.

7 **STANDARD GOVERNING INEFFECTIVE ASSISTANCE CLAIMS**

8
9 Ineffective assistance claims are analyzed under the two-part
10 *Strickland* test. First, the defendant must demonstrate his attorney's
11 performance was deficient. *Strickland v. Washington*, 466 U.S. 668,
12 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This prong sometimes is
13 referred to as the "performance" prong. In order to establish
14 deficient performance, the defendant must show his attorney acted
15 unreasonably "under prevailing professional norms." *Id.* at 688, 104
16 S.Ct. 2052. Second, the defendant must demonstrate he suffered
17 prejudice. *Id.* at 687, 104 S.Ct. 2052. This prong sometimes is
18 referred to as the "prejudice" prong. In order to establish
19 prejudice, he "must show that there is a reasonable probability that,
20 but for counsel's unprofessional errors, the result of the proceeding
21 would have been different. A reasonable probability is a probability
22 sufficient to undermine confidence in the outcome." *Id.* at 688, 104
23 S.Ct. 2052.

24
25 The fact the prejudice prong is listed as the second prong in the
26 *Strickland* test does not mean the Court must reserve ruling upon

1 prejudice until it assesses the performance of the defendant's
2 attorneys. To the contrary, the Supreme Court urges lower courts to
3 apply the test in a commonsense manner:

4 Although we have discussed the performance component of an
5 ineffectiveness claim prior to the prejudice component,
6 there is no reason for a court deciding an ineffective
7 assistance claim to approach the inquiry in the same order
8 or even to address both components of the inquiry if the
9 defendant makes an insufficient showing on one. In
10 particular, a court need not determine whether counsel's
11 performance was deficient before examining the prejudice
12 suffered by the defendant as a result of the alleged
13 deficiencies. The object of an ineffectiveness claim is not
14 to grade counsel's performance. If it is easier to dispose
15 of an ineffectiveness claim on the ground of lack of
16 sufficient prejudice, which we expect will often be so, that
17 course should be followed.

18 466 U.S. at 697, 104 S.Ct. 2052. Thus, the Court need not assess the
19 performance of the defendant's attorneys where it is clear he suffered
20 no prejudice from their alleged errors.

21 **FIRST GROUND: FAILURE TO OBJECT TO TESTIMONY**

22 At trial, the government asked the Spanish-speaking detective to
23 relate some of the statements the defendant made to the informant and
24 to explain their significance. The defendant's trial attorney did not
25 object to this evidence. The defendant submits his attorney should
26 have done so. According to the defendant, the detective's testimony
was expert testimony that did not satisfy the requirements of Federal
Rule of Evidence 702. Not only that, says the defendant, but the
detective's testimony improperly suggested he fit the profile of a

1 drug courier.

2 It is unnecessary for the Court to determine whether the
3 defendant's trial attorney should have objected to the disputed
4 testimony. Even if the defendant's attorney had objected to the
5 disputed evidence, and even if the Court had sustained the objections,
6 the remaining evidence linking the defendant to the crimes was
7 overwhelming. The defendant admitted he knew the person to whom he
8 was going to introduce the informant had a reputation as a drug
9 dealer. The defendant spoke to the informant at a restaurant across
10 the street from Mr. Perales' auto body shop. The informant was
11 wearing an electronic device that enabled a Spanish-speaking detective
12 to record his conversations with the defendant. Even without the
13 detective's interpretation, the defendant's statements to the
14 informant indicated he was actively involved in the transaction. Were
15 there a reasonable doubt in that regard, it was resolved by subsequent
16 events. The defendant escorted the informant to Mr. Perales' shop and
17 introduced him to Mr. Perales. The defendant obtained bleach so the
18 informant could test the methamphetamine. He was present when the
19 informant acknowledged the quality of the methamphetamine and agreed
20 to purchase eight pounds for eighty-eight thousand dollars. He
21 remained with Mr. Perales when the informant left the shop to arrange
22 for payment, and he was sitting with Mr. Perales when law enforcement
23 officers entered the shop. Given the preceding undisputed evidence,
24 it is unlikely the jury would have acquitted the defendant had the
25
26

1 Court excluded the detective's interpretation of the defendant's
2 statements to the informant. To the contrary, there is every reason
3 to think the verdict would have been the same. Consequently, the
4 defendant suffered no prejudice from the admission of the detective's
5 interpretation of his statements. As a result, the defendant was not
6 deprived of effective assistance by his trial attorney's failure to
7 object.

8
9 **SECOND GROUND: FAILURE TO ESTABLISH DEFENDANT WAS A MINOR**
10 **PARTICIPANT**

11 At sentencing, the defendant's attorney argued he was a minor
12 participant in the crimes and, thus, was entitled to a two-level
13 reduction of his base offense level under U.S.S.G. § 3B1.2. The Court
14 rejected the argument and denied the adjustment. The Ninth Circuit
15 affirmed. The defendant argues the outcome would have been different
16 had the attorney "provide[d] available persuasive authority" in
17 support of an adjustment under § 3B1.2. However, the defendant has
18 not identified any evidence that his attorney failed to present
19 indicating he was "substantially less culpable than the average
20 participant." U.S.S.G. § 3B1.2, comment. (n.3(A)). Nor is there any
21 reason to think such evidence exists. Consequently, he lacks a basis
22 for arguing his attorney's performance at sentencing was deficient.

23
24 **THIRD GROUND: FAILURE TO MOVE TO DISMISS**

25 The defendant argues his trial attorney should have moved to
26 dismiss the indictment on the ground it was not returned in "open

1 court" as required by Federal Rule of Criminal Procedure 6(f). The
2 problem with the defendant's argument is that it is contradicted by
3 the record. The government has documented the fact that the
4 indictment was returned in open court by the presiding grand juror.
5 Thus, it would have been futile for the defendant's attorney to
6 challenge the indictment on the ground suggested by the defendant.
7 Furthermore, mounting such a challenge would have wasted judicial
8 resources and undermined the defendant's credibility. It follows the
9 defendant's trial attorney did not err in failing to challenge the
10 validity of the indictment.
11

12 **FOURTH GROUND: CUMULATIVE ERROR**

13 The attorney who represented the defendant at trial stepped aside
14 after the jury returned its verdict. A new attorney represented the
15 defendant at sentencing. This attorney stepped aside after the Court
16 sentenced the defendant. A third attorney represented the defendant
17 on appeal. The defendant is critical of all three attorneys. His
18 complaints may be divided into the following groups: those pertaining
19 to all of his attorneys; those pertaining to his trial attorney; those
20 pertaining to his sentencing attorney; and those pertaining to his
21 appellate attorney. While he seems to concede no one of the alleged
22 deficiencies is sufficient to establish ineffective assistance of
23 counsel, he argues that, taken together, they do.
24

25 All Attorneys

26 The defendant makes two complaints about all of his attorneys.

1 To begin with, he alleges they were subject to conflicts of interest.
2 However, he does not identify a conflict, much less explain how it
3 compromised the representation he received. Absent such information,
4 the defendant's first complaint fails. Next, the defendant complains
5 his attorneys did not provide him with information to which he was
6 entitled. More particularly, he alleges they refused to give him
7 copies of "offense reports, presentence reports, and court filings."
8 He may be correct. However, the issue is not whether he received
9 copies, but whether his attorneys discussed the contents of the
10 reports with him. There is every indication they did. The
11 presentence reports are a good example. At the defendant's sentencing
12 hearing, the Court asked him whether the presentence reports had been
13 read to him in Spanish. He answered in the affirmative. This
14 indicates his sentencing attorney communicated with him. Certainly,
15 there is no indication his sentencing attorney, or any other attorney,
16 withheld material information from him which, had he known it, would
17 have affected the decisions he made.
18

19 Trial Attorney

20 Most of the defendant's criticism is directed at his trial
21 attorney. First, the defendant alleges his trial attorney failed to
22 file pretrial motions. However, as the government points out, his
23 trial attorney did, in fact, file a motion to suppress. (It was
24 denied.) Second, the defendant alleges his trial attorney failed to
25 conduct an adequate investigation. However, he does not identify any
26

1 evidence his trial attorney overlooked. Third, the defendant alleges
2 his trial attorney failed to object to inadmissible evidence.
3 However, other than the Spanish-speaking detective's testimony, he has
4 not identified any evidence to which his trial attorney should have
5 objected. Fourth, the defendant alleges his trial attorney failed to
6 offer essential jury instructions and failed to take exception to
7 prejudicial instructions that were given by the Court. However, he
8 does not identify any jury instructions his trial attorney should have
9 proposed, and he does not cite any instructions to which his trial
10 attorney should have taken exception.
11

12 Sentencing Attorney

13 The defendant alleges his sentencing attorney failed to object to
14 the Court's consideration of facts that had not been determined by the
15 jury beyond a reasonable doubt. Just which facts the defendant is
16 referring to is unclear. Perhaps he means the quantity of
17 methamphetamine for which the Court found him accountable. If so,
18 this allegation is baseless. As the government points out, the jury
19 made a finding regarding quantity. The Court relied upon the jury's
20 finding to calculate the defendant's guideline range.
21

22 Appellate Attorney

23 The defendant makes two complaints about his appellate attorney.
24 To begin with, he alleges she did not present the issues that were
25 most likely to result in reversal of his conviction and sentence. In
26 addition, he alleges she failed to timely file a petition for a writ

1 of certiorari. Neither allegation is sufficient to establish he was
2 deprived of constitutionally effective assistance of counsel. As far
3 as his appellate attorney's briefing is concerned, he has not
4 identified any issue she failed to raise. Consequently, the Court
5 cannot say her advocacy was deficient. As far as his petition for a
6 writ of certiorari is concerned, he is correct about one thing. It
7 was one day late. Nevertheless, there is no reason to think the
8 Supreme Court would have agreed to review his case had the petition
9 been timely.

11 Conclusion

12 The Court has examined each of the errors alleged by the
13 defendant in his fourth ground for relief. Whether the alleged errors
14 are considered individually or collectively, they do not warrant
15 habeas relief.

16 **FIFTH GROUND**

17 The fifth ground alleges the defendant's conviction and sentence
18 violate the First, Fourth, Fifth, Sixth, and Eighth Amendments to the
19 Constitution. However, he does not set forth any facts in connection
20 with the Fifth Ground that support the broad allegations set forth
21 therein. Nor does he discuss the Fifth Ground in the body of his
22 motion. Thus, there is nothing for the Court to analyze.

24 **EVIDENTIARY HEARING**

25 In order to qualify for an evidentiary hearing, the defendant
26 must, at a minimum, "allege specific facts which, if true, would

1 entitle him to relief[.]” *United States v. Howard*, 381 F.3d 873, 877
2 (9th Cir.2004). The defendant has not satisfied this requirement.
3 His motion alleges very few specific facts, and those fact he alleges
4 would not entitle him to relief even assuming they’re true. Rather,
5 “the petition, files and record of the case . . . conclusively show
6 that he is entitled to no relief.” *Id.* Thus, he is not entitled to
7 an evidentiary hearing.
8

9 **APPOINTMENT OF ATTORNEY**

10 There are three circumstances in which a district court must
11 appoint counsel to represent a defendant seeking relief under § 2255.
12 One circumstance arises when the moving party is entitled to conduct
13 discovery, and appointment of counsel is necessary for effective
14 discovery. Rules Governing Section 2255 Proceedings 6(a), 28 U.S.C.
15 foll. § 2255. A second circumstance arises when the moving party is
16 entitled to an evidentiary hearing. *Id.*, Rule 8(c). A third
17 circumstance arises when the failure to appoint counsel would result
18 in a proceeding that is so unreliable that it would deprive the moving
19 party of due process of law. *Brown v. United States*, 623 F.2d 54, 61
20 (9th Cir.1980) (citing *Dillon v. United States*, 307 F.2d 445, 446-47
21 (9th Cir.1962)). None of the three circumstances arises in this case.
22 To begin with, the defendant has failed to establish discovery would
23 uncover any information that would warrant habeas relief. As a
24 result, there is no need for discovery. That being the case, there is
25 no need to appoint an attorney in order to help effectuate the
26

1 discovery process. Nor is it necessary to appoint an attorney to
2 represent the defendant during an evidentiary hearing. As explained
3 above, there will be no such hearing. Finally, the defendant has
4 demonstrated the ability to set forth those grounds he thinks justify
5 relief under § 2255. Given the information he has presented, given
6 the information the government has presented, and given the Court's
7 independent review of the record, the Court has a reliable basis for
8 assessing the validity of the grounds asserted by the defendant. The
9 failure to appoint an attorney will not deprive the defendant of his
10 right to due process.
11

12 **IT IS HEREBY ORDERED:**

- 13 1. The defendant's motion to vacate (**Ct. Rec. 356**) is denied.
14 2. The defendant's request for an evidentiary hearing is denied.
15 3. The defendant's request for appointment of an attorney is
16 denied.
17 4. The Court declines to issue a certificate of appealability.
18 28 U.S.C. § 2253(c) (1) (B).
19

20 **IT IS SO ORDERED.** The District Court Executive is hereby
21 directed to enter this order and furnish copies to the defendant and
22 to counsel for the government.

23 **DATED** this 14th day of February, 2011.

24 s/ Fred Van Sickle
25 Fred Van Sickle
26 Senior United States District Judge